No. 10,455

IN THE 7

United States Circuit Court of Appeals

For the Ninth Circuit

WESTERN VEGETABLE OILS COMPANY, INCORPORATED (a corporation),
Appellant,

vs.

SOUTHERN COTTON OIL COMPANY (a corporation), SOUTHERN PACIFIC COMPANY (a corporation),
Appellees.

APPELLANT'S REPLY BRIEF.

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Subject Index

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APPELLANT'S REPLY BRIEF.

I.

ANALYSIS OF BRIEF FOR APPELLEE SOUTHERN COTTON OIL COMPANY.

The brief for appellee Southern Cotton Oil Company, filed herein, can be divided into two main portions as follows:

(1) A procedural contention that the specifications of error in appellant's brief are insufficient.

(2) Appellee's argument on the merits of this appeal.

These two portions of the brief for appellee will be dealt with separately.

II.

APPELLEE'S CONTENTION THAT APPELLANT'S SPECIFICATIONS OF ERROR ARE INSUFFICIENT.

This appeal is from an order of the District Court denying appellant's motion to stay proceedings in the District Court. The District Court's order denying the motion took the form of a "Memorandum and Order Denying Motion to Stay Trial." (Tr. p. 90.) The memorandum is in the nature of an opinion in which various of the considerations which were in the mind of the Court are discussed, and is followed by the District Court's order denying appellant's motion. It is from this order that the appeal is taken. This order is the action of the District Court involved in this appeal, is the error of the court to be considered upon this appeal and is thus the only error which it is necessary to specify.

Appellee cites several cases all relating to assignments of error upon appeals from decisions of District Courts after full trial on the merits. Since assignments of error are no longer necessary upon appeals to the Circuit Court of Appeals, the pertinence of any of these cases may well be doubted. However, even if it is proper to apply principles involving assignments of error committed in the course of a

full trial on the merits to the specifications of error now required by the rules of the Ninth Circuit to be set forth in briefs on appeal, the cases cited by appellee are not in point. The District Court's action in denying appellant's motion does not resemble the action of a court in admitting or excluding evidence offered in the course of a trial or in making findings of fact or in drawing conclusions of law. It does resemble an action of a court upon a motion for judgment upon the pleadings or upon a demurrer.

It is a sufficient assignment of error to state that the court erred in sustaining a demurrer.

Judge v. Pullman, 209 Fed. 10;

Smith v. Royal Insurance Co., 93 Fed. (2d) 143 (9 C.C.A.).

It is likewise a sufficient assignment of error to state that the court erred in overruling a demurrer.

Mitsui v. St. Paul Fire & Marine Insurance Co., 202 Fed. 26 (9 C.C.A.).

It is a sufficient assignment of error to state that the court erred in granting a motion for judgment on the pleadings.

Klink v. Chicago R. I. & P. Railway Company, 219 Fed. 457.

Finally, it is well established, as shown by *Stoody Co. v. Mills Alloys,* 67 Fed. (2d) 807 (9 C.C.A.), a case cited by appellee, that error is not assignable to the opinion of the court, since what is subject to review is what the court did, and not what it said nor

the reasons it gave for its judgment. A reading of the District Court's "memorandum" which preceded its order leads to various assumptions as to why the court thought the motion of appellant should be denied, but these assumptions are matter for argument not for specification of error. A possible exception is the statement of the District Court immediately preceding its order denying the motion that "I am of the opinion that the controversy does not come within the terms of the arbitration clause,". In order to meet a possible contention that this language is to be construed as a part of the court's judgment appellant has assigned it as error. Appellee can hardly complain of this additional, and unnecessary, specification of error.

III.

APPELLEE'S ARGUMENTS ON MERITS.

This portion of the appellee's brief may again be divided into two parts:

(a) Appellee's attempts to refute appellant's contentions.

(b) New matter.

Appellant contended as shown by appellant's statement of points (Tr. p. 107) that the controversy which is the subject matter of the action brought by appellee arises from a contract providing for arbitration, that the controversy is one which is referable

to arbitration under the contract and that appellant has not waived its right to such arbitration.

Appellee contends that the contract does not provide for arbitration apparently on the ground that the rules of the National Institute of Oilseed Products, which include the rules providing for arbitration, are not sufficiently incorporated by reference in the contract itself and, apparently, on the ground that even if the rules of the National Institute of Oilseed Products are to be treated as a part of the contract the rules respecting arbitration are not.

To support its contention that there is insufficient incorporation of these rules in the contract by reference appellee cites *General Silk Importing Co.,* 189 N. Y. S. 391 and *Bachmann Emmerick & Co. v. S. A. Wenger & Co.,* 197 N. Y. S. 879. Both of these cases are of the type referred to on page 8 of appellant's brief as having been specifically distinguished in *Hines v. Ziegfeld,* 226 N. Y. S. 562 (1928). The distinction between these cases and *Hines v. Ziegfeld,* supra, is that in these cases the arbitration clause was contained in a separate document which was not stated to be made a part of the agreement out of which the dispute arose. The contract between appellant and appellee contains the specific statement that the published rules and regulations of the National Institute of Oilseed Products "are hereby made a part of this contract,". In *Hines v. Ziegfeld,* supra, the language was the same and the court based its decision in part upon this language.

Appellee attempts further to distinguish *Hines v. Ziegfeld,* supra, by maintaining that the agreement of employment constituted no more than an agreement to enter into the actor's equity form of contract containing the arbitration clause. An inspection of this decision will show that such is not the case, that the agreement between the parties was complete in itself, and that the reference to the actor's equity form of contract was in all respects the same as the reference in the contract between appellant and appellee to the published rules of the National Institute of Oilseed Products. Furthermore, *Hines v. Ziegfeld,* supra, was specifically decided upon the original agreement of employment and not upon any subsequent agreement to arbitrate the controversy.

To support its claim that only some of the published rules and not those requiring arbitration became a part of the contract here involved appellee cites *Thomas & Co. v. Portsea S.S. Co.,* 12 Aspinall M. C. (N. S.) 23 (1912). It is difficult to see any resemblance between the bill of lading in that case and the contract in the case at bar. There the charter party contained a provision respecting the arbitration of disputes arising from breach of a charter party whereas the dispute in question arose between parties to a bill of lading. The rights and duties of shipper and holder of a bill of lading and the rights and duties of the parties to a charter may be, and frequently are, very different. Appellant and appellee were respectively seller and buyer under a contract

of sale and the published rules and regulations of the National Institute of Oilseed Products all relate to the rights and duties of persons bearing exactly that relationship to one another. The intention of these parties to be bound by all of these published rules is plain.

Appellee's attempt to maintain that the controversy here involved is not referable to arbitration under the arbitration clause is fully discussed in appellant's brief, pp. 14 to 20. It is well to note, however, that appellee seems to rely heavily upon *B. Fernandez & Hnos v. Rickert Rice Mills, Inc.,* 119 F. (2d) 809, 814 (1 C.C.A.). That this case has no application at all to the situation created by the contract between appellant and appellee is obvious even from an inspection of appellee's quotations. The arbitration clause involved in *B. Fernandez & Hnos v. Rickert Rice Mills, Inc.,* supra, required arbitration of disputes as to quality, but the contract provided that a certain certificate as to quality should be conclusive. There was thus a square conflict between two different provisions of a contract which required the court's interpretation. The court rightly held that the particular provision with respect to the certificate of quality controlled the general provision regarding arbitration. Furthermore, in this case one of the parties apparently contended that the arbitrators, and not the court, had the power to decide whether the controversy came within the arbitration clause. No such contention is necessary in the case at bar as that very

question is involved upon this appeal and it is appellant's position that the District Court was wrong in its decision that the controversy is not referable to arbitration under the arbitration clause with which we are here concerned.

Appellee also contends that the appellant was in default in proceeding with the arbitration at the time this action was commenced. We believe that appellant has completely disposed of this contention in its brief, pp. 21-25. It is perfectly plain upon the authorities there cited that the party to a contract in appellant's position is not in default in proceeding with arbitration and has not waived its rights to arbitration if the defense is raised by answer in a suit brought upon the contract. When this dispute arose appellee and not appellant had the burden of going forward. Appellee made claims upon appellant which appellant believed and still believes are unjustified. If appellee wished to press those claims by any action beyond correspondence it was the duty of appellee to assert the claims in the manner provided in the contract, namely, by referring the claims to arbitration. Instead, it chose to bring suit. It is thus appellee and not appellant who is in default under the provisions of the contract requiring arbitration. The burden of submitting the dispute to arbitration was not upon appellant but upon appellee, the claimant and moving party, and the party upon whom the burden of going forward always rests.

Under the heading of "New Matter" may be placed the appellee's argument that the contract between appellant and appellee provided for "common law" arbitration. Appellee seems to deduce that, if the arbitration provided for was "common law" arbitration, appellee revoked the agreement to arbitrate by bringing suit.

Whether a given arbitration agreement is "statutory" or "common law" is a question not only of the terms of the agreement, but also of the terms of the statute governing such matters. The arbitration statute in any particular jurisdiction may be so narrow and restrictive, as most of the earlier arbitration statutes were, that to come within it the agreement of the parties must practically incorporate the statutory terms. The statute may, however, be so broad and general, as the present New York, Federal and California statutes are, that most if not all agreements relating to arbitration fall within its provisions. It is the plain intent of these later statutes to give legislative sanction and implementation to virtually every sort of arbitration agreement even though the terms of the statute are not copied into the agreement.

Many cases have held that a common law arbitration can exist side by side with an arbitration under the statute, i.e., that a contract for arbitration may be made, valid as a common law arbitration, even though invalid for some reason under the particular arbitration statute. Thus the inquiry as to whether

an arbitration agreement is "common law" or "statutory" is usually to determine whether it is valid at common law though not so under the statute, or valid under the statute though not so at common law. As shown by the California cases cited by appellee these principles developed in the course of upholding arbitration agreements as valid at common law against attack on the ground that they did not meet the requirements of the statute. Appellee attempts to use this principle for the opposite purpose, to evade an arbitration agreement on the ground that it provided for arbitration at common law, was revocable, and is revoked by bringing action.

It may well be doubted whether under the California law since 1927 statutory and common law arbitration continued to exist side by side where future controversies are involved. No California cases have decided this question since 1927. All of the cases cited by appellee were decided under the older law which bears virtually no resemblance to the present statute.

The present Section 1280 of the Code of Civil Procedure is general, mandatory, and substantive in its terms stating that "a provision in a written contract to settle by arbitration a controversy thereafter arising * * * shall be valid, enforceable and irrevocable". There is no requirement as to the form of the agreement except that it appear in a written contract. Section 1282, in providing for the enforcement of such an agreement states "if the finding be that a

written provision for arbitration was made and there is a default in proceeding thereunder, an order shall be made summarily directing the parties to proceed with the arbitration in accordance *with the terms thereof"*. Again Section 1284 relating to stays of civil actions provides for the stay until the arbitration has been had *"in accordance with the terms of the agreement"*. The remaining sections of the present act are permissive, procedural and designed to implement the general law if the parties wish to use them.

An examination of these provisions leaves little room for the contention that the agreement itself must provide specifically for and incorporate within its terms every procedural step permitted by the statute in order to avoid being a common law arbitration and therefore revocable.

The law as it stood at the time the California cases cited by appellee were decided was very substantially different. No Section 1280 existed at all. No provisions appeared anywhere in the statute similar to those of Section 1282. Section 1283, prior to 1927, merely provided that a submission to arbitration was irrevocable only when filed with the County Clerk. The only sections of the older law having any resemblance to the present were Sections 1287 and 1288, relating to vacation and modification of the award by the court for various errors committed by the arbitrators. The present Sections 1288 and 1289 roughly correspond. It is obvious from a comparison of these sections that very many written contracts providing

for arbitration could, prior to 1927, fail to meet the exacting specifications of the statute, particularly where future disputes were concerned. The California cases cited by appellee are all examples of the upholding of such agreements as valid common law submissions when the rigid requirements of the older statute were not met. They decide nothing pertinent here.

In fact, the conclusion is inescapable that whether or not common law arbitration any longer exists in California side by side with "statutory" arbitration, all arbitration agreements, embodied in a written contract, except those pertaining to labor, are irrevocable, whether or not they use the exact language of the statute.

Appellee also cites *Lehigh Constructural Steel Co. v. Rust,* 59 Fed. (2d) 1038. This case involved the United States Arbitration Act which contains a provision absent from the California law that summary judgment upon an award may be had when the parties have so agreed. The parties had not so agreed and the court denied a motion for summary judgment. The court did not say that failure so to agree rendered the whole agreement invalid under the statute.

Carey v. Herrick, 263 Pac. 190 (Wash.), likewise cited by appellee, was decided under the Washington statute wholly unlike the California present law and bearing more resemblance to the older California law. Further, as shown by *Fisher Flouring Mills v. U. S.*, 17 Fed. (2d) 232, the Washington courts have held

that there is no common law arbitration in Washington and that the statutory methods there are exclusive. In so far as the case is relevant here, it supports the view that there is no longer common arbitration in California.

We have already pointed out that the written agreement providing for arbitration need not spell out every right or privilege given a party by the statute. We should also point out, however, that what appellee seems to consider deviations in the agreement from the statute are not such. Under the agreement oral evidence and personal appearance may be requested by the arbitrators. Under the statute the arbitrators may make the same requirement. The right to make such requirement is not denied to the arbitrators by the agreement. The agreement does not require acknowledgment of the award. Neither does the statute, which only provides that the award must be acknowledged if an application be made thereon for an order of court confirming it. This might be done at any time and certainly the agreement does not forbid it.

In *Marine Transit Corporation v. Dreyfus,* 284 U.S. 263, 76 L. Ed. 282, the court held that where the agreement for arbitration stipulates that the award should be "final and binding", but does not stipulate that under the United States Arbitration Act judgment may be entered upon the award the arbitration agreement is valid under the statute. In *In re Resolute Paper Products Corp.,* 290 New York

Supp. 87, the court held that under the New York law a submission to arbitration was statutory even though the agreement of submission made no reference to the entry of judgment upon the award. The court pointed out that omissions from the agreement such as this are omissions of permissive, not mandatory, provisions and do not affect the validity of the arbitration agreement. It is noteworthy that the agreement in this case provides nothing more than this.

Also in the category of new matter is appellee's contention that Rule 33 of the published rules and regulations of the National Institute of Oilseed Products in some manner eliminates the necessity for arbitration.

An inspection of the language of Rule 33 shows the contrary. The language is that if a shipment is lost "contract to be void *to the extent of such quantity*". The plain meaning of this provision is merely that if a portion of a shipment is lost the buyer is not to be required to receive, nor the seller to supply an additional quantity sufficient to make up the loss. It has no bearing upon the provisions of the contract generally and no bearing whatever upon the responsibility of one of the parties to the other for the loss. Sales of vegetable oils are made under certain price and market conditions and to meet certain requirements of buyer and seller. To require the *quantity* of a lost shipment to be subsequently delivered or

received could in many instances unduly increase the burden of the loss to the party responsible therefor. It is to avoid this result that this rule is so worded. It should be pointed out that in this case the contract provides that the sale is made "f.o.b." Oakland. In these circumstances the risk of loss is to be borne by the buyer, as Rule 7 of the National Institute of Oilseed Products specifically states. It is obvious that the loss suffered by the buyer could be greatly increased if he were required to purchase and pay for a subsequent shipment. In view of Rule 7, and the language of the contract, it seems obvious that appellant is not required to return to appellee any money paid by appellee to appellant. This question, however, is one which must be submitted to arbitration under the provisions of the agreement.

Finally, and again in the category of new matter, is appellee's apparent contention that the District Court cannot stay proceedings in this action by virtue of the provisions of the law of California. That this position is wholly untenable is shown by *Pacific Indemnity Co. v. Insurance Co. of North America,* 25 Fed. (2d) 930, cited in appellant's brief. There the application for a stay of proceedings was made in the federal court, and granted upon the basis of the California law.

Appellee attempts to treat the granting of a stay of proceedings as specific enforcement of the agreement to arbitrate. The two are entirely different as

is clearly held in *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.,* both in the Circuit Court of Appeals, reported in 70 Fed. (2d) 297 and in the Supreme Court reported in 293 U.S. 449, 79 L. Ed. 583. In fact, the case cited to sustain appellee's position, *California Prune & Apricot Growers Ass'n v. Catz American Co.,* 60 Fed. (2d) 788, is specifically distinguished upon this very ground in *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.,* supra, in the Circuit Court of Appeals.

In the case at bar the contract between appellant and appellee provides that it is governed by the laws of California. (Tr. p. 22.) The motion of appellant in the District Court therefore referred to the California law respecting a stay of proceeding in such cases. The question before the court, however, included, among various other considerations, the power of the court to grant the stay. The existence of this power under the United States Arbitration Act was raised by appellee itself in argument upon the motion. The District Court, in its decision and in its opinion does not refer to its power to grant the stay nor to the source of this power. It is therefore necessary for appellant to discuss in its brief the sources of the court's power which are plainly both the United States Arbitration Act and the provisions of the Code of Civil Procedure of the State of California.

It is therefore respectfully submitted that for the reasons set forth in appellant's brief and in this reply

brief the order of the District Court should be reversed with directions to the District Court to grant a stay of proceedings in this action until arbitration can be had.

Dated, San Francisco,
September 10, 1943.

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